IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND FITHIAN, JR.,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
SUPERINTENDENT SHANNON, et. al.	:	**NO. 02-1861**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **July 23, 2002**

Raymond Fithian, Jr. ("Fithian" or "Petitioner"), a prisoner in state custody at the State Correctional Institution at Frackville, Pennsylvania, petitions for a writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred for a Report and Recommendation ("R&R") to Magistrate Judge Charles B. Smith ("Judge Smith"), who ordered the District Attorney to file an answer to the petition. Judge Smith then filed an R&R that the petition be denied. After de novo consideration of the pleadings and briefs, including petitioner's objections to the R&R, the R&R will be approved and adopted, and the petition will be denied.

I. **Background**[1]

On July 9, 1998, a jury convicted petitioner of aggravated assault in violation of 18 Pa.C.S.A. § 2702 (a)(1) and possession of an instrument of crime in violation of 18 Pa.C.S.A. § 907. Petitioner was sentenced to six to twelve years in prison. Petitioner filed post-sentence motions claiming newly discovered evidence and insufficient evidence to sustain conviction. The court denied the motions on December 16, 1998. Since petitioner did not appeal the sentence, his conviction became final on

[1]Facts taken from Judge's Smith R&R and District Attorney's Answer.

January 16, 1999, when the time for seeking appeal in the Pennsylvania Superior Court expired.

On August 10, 1999, Fithian, filing a pro se motion under the Pennsylvania Post-Conviction Relief Act ("PCRA"), claimed ineffective assistance of trial counsel. After appointing counsel and conducting an evidentiary hearing, the court filed findings of fact and denied petitioner relief on December 28, 2000. Petitioner filed a timely Notice of Appeal with the Pennsylvania Superior Court. The Superior Court affirmed on November 8, 2001. The Pennsylvania Supreme Court denied allocatur on March 6, 2002.

Petitioner filed the instant pro se Petition for Writ of Habeas Corpus on April 4, 2002. Fithian argues:

(1) Ineffective assistance of trial counsel for failing to present witnesses potentially supporting an affirmative defense.

(2) Ineffective assistance of trial counsel for failing to cross-examine the victim at trial adequately.

(3) Ineffective assistance of trial and appellate counsel for failing to offer the testimony of an eyewitness to the incident, Mrs. Phyllis Gagliotti (hereinafter "Gagliotti claim").

Magistrate Judge Charles B. Smith filed a R&R that the pending petition for writ of habeas corpus be denied because: 1) the Gagliotti claim is procedurally defaulted; 2) trial counsel was not ineffective for failing to call certain witnesses; and 3) trial counsel was not ineffective because he cross-examined the victim as to disparities between his statements to police and at trial.

Fithian has filed several objections to the R&R. He objects that: 1) he was entitled to effective post-trial representation; 2) the procedurally defaulted Gagliotti claim should have been excused under either "miscarriage of justice" or "cause and prejudice"; 3) trial counsel was ineffective for failing to

conduct any pre-trial investigation; and, 4)trial counsel failed to cross-examine the victim adequately.

II. **Procedural Default**

To obtain federal review, Fithian first must exhaust state remedies; he must give the highest state court an opportunity to review each claim. O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728, 1731 (1999) ("[the court] ask[s] not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts.") A petitioner has not exhausted available state remedies if he has a right under state law to raise a claim through any available procedure. 28 U.S.C. § 2254 (c); Castille v. Peoples, 489 U.S. 346, 350, 109 S. Ct. 1056, 1059, reh'g denied, 490 U.S. 1076, 109 S. Ct. 2091 (1989). Fithian never presented the Gagliotti claim in state court, and therefore failed to exhaust remedies for that claim.

Procedural default bars federal review of habeas claims precluded by state law. If a petitioner fails to exhaust state remedies, and the court to which petitioner would present his claims would now find petitioner's claims procedurally barred, then "there is procedural default for the purpose of federal habeas." Coleman v. Thompson, 501 U.S. 722, 735 n. 1, 111 S. Ct. 2546, 2557 n. 1 (1991), reh'g denied, 501 U.S. 1277, 112 S. Ct. 27 (1991); McCandless v. Vaughn, 172 F.3d 255, 260 (Cir. 1999). A federal court should dismiss a petition as procedurally barred if state law deems it defaulted. Carter v. Vaughn, 62 F.3d 591, 595 (3d Cir. 1995).

Fithian's Gagliotti claim is procedurally defaulted because the statute of limitations for appealing his conviction under the PCRA has run, so petitioner can no longer seek state court

relief.

Petitioner can obtain federal habeas review of a procedurally defaulted claim only if he can demonstrate: (1) "cause for the default and actual prejudice" from the failure to consider his claim; or (2) that the failure could result in a "fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 115 L.Ed.2d 640, 111 S. Ct. 2546 (1991). To demonstrate "cause for the default and actual prejudice," petitioner must show that the error at trial worked to petitioner's actual and substantial disadvantage, "infecting his entire trial with error of constitutional dimensions." Murray v. Carrier, 477 U.S. 478, 494 (1986) (quoting United States v. Frady, 456 U.S. 152, 170-172 (1982), reh'g denied, 456 U.S. 1001 (1982).

To establish a "fundamental miscarriage of justice," Fithian must make a colorable claim of "actual innocence." See Calderon v. Thompson, 523 U.S. 538, 559-560, 118 S. Ct. 1489, 1503 (1998) (a colorable claim of "actual innocence" requires petitioner to come forward with reliable evidence not presented at trial to demonstrate that "it is more likely than not that no reasonable juror would have convicted petitioner in light of the new evidence.") A "fundamental miscarriage of justice," only occurs in extraordinary situations where "a constitutional violation result[s] in the conviction of [an] actual innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986).

Judge Smith correctly found Fithian did not establish "cause and prejudice." Petitioner objects and argues that PCRA counsel's ineffectiveness on the PCRA appeal constitutes cause and prejudice sufficient to excuse a procedural default. There is no constitutional right to counsel for a collateral attack on a conviction. Lines v. Larkins, 208 F.3d 153, 165 (3d Cir. 2000). Fithian argues that under Pennsylvania law, he could

attempt to challenge the effectiveness of PCRA counsel. Under Pennsylvania law, petitioner may attempt to challenge the effectiveness of PCRA counsel only through a second PCRA petition. Lines v. Larkins, supra. Petitioner's argument fails to establish cause for the procedural default.

Petitioner further objects that the Gagliotti claim should be excused from procedural default because the failure to review the merits of the claim would result in a "miscarriage of justice." Pet. Rply. at 30. Local Rule of Civil Procedure 72.1 (IV)(c) provides that "all issues and evidence shall be presented to the magistrate judges, and...new issues and evidence shall not be raised after the filing of the Magistrate's Report and Recommendation if they could have been presented to the magistrate judge." L. R. Civ. P. 72 (IV)(c). Since petitioner failed to raise the "miscarriage of justice" exception to excuse the procedural default regarding the Gagliotti claim, the court declines to consider the Gagliotti claim on the merits.

III. **Discussion**

A. **Standard of Review**

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), increases the deference federal courts must give to the factual findings and legal determinations of the state courts. A habeas petition filed after the enactment of the AEDPA requires a two step analysis: (1) the federal court must determine whether the state court's decision was contrary to Supreme Court precedent; (2) if the state court's decision was not contrary to Supreme Court precedent, the court must determine whether the state court unreasonably applied Supreme Court precedent. See Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877, 890 (3d Circ. 1999); Williams v. Taylor, 529 U.S. 362, 412, 146 L.Ed. 2d 389, 120 S. Ct. 1495 (2000).

Claims for ineffective assistance of counsel must be evaluated under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2502, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984). Fithian must show his "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. Then, he must show he was prejudiced by his counsel's performance because, but for his lawyer's unreasonable errors, the result would have been different. Id. at 687.

This court must review petitioner's claim with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689. Fithian bears the burden of showing counsel's representation was ineffective. Counsel cannot be ineffective for failing to state meritless claims, and counsel's strategic choices are reviewed with a strong presumption of correctness. See id.; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996); Commonwealth v. Wilson, 393 A.2d 1141, 1143 (Pa. 1978); see also Mahoney v. Vaughn, 2001 U.S. Dist. LEXIS 428 (E.D. Pa. 2001) (applying Strickland's test and denying a habeas corpus petition based on a meritless claim of ineffective assistance of counsel.)

B. Fithian's Ineffectiveness of Counsel Claims

1. Ineffective Assistance of Trial Counsel for Failing to Present Witnesses Potentially Supporting Affirmative Defense

Fithian first argues that his trial counsel failed to investigate, interview, subpoena, and present three witnesses who could have supported his claim of self-defense. Fithian claims that three witnesses (John Carr, William Dostellio, and William Steele) could testify to the victim's propensity for violent acts, and show Fithian's necessity for self-defense. R&R at 11. Fithian, objecting to the R&R, argues that "defense counsel's

failure to conduct any pretrial investigation, visit the scene of the incident, or interview any witnesses is ineffective assistance, and the evidence established that defendant was prejudiced by lack of investigation." Pet. Rply. at 21.

A reviewing court may find decisions that an attorney made "to be sufficiently deficient only if he either failed to consult with his client, or if the decision was itself inept or incapable" of sound interpretation. United States v. Narducci, 18 F. Supp. 2d 481, 493 (E.D. Pa. 1997). The decisions of which witnesses to call to testify are strategic, and therefore left to counsel. Diggs v. Owens, 833 F.2d 439, 446 (3d Cir. 1987), cert. denied, 485 U.S. 979, 99 L.Ed. 2d 488, 108 S. Ct. 1277 (1988); United States v. Merlino, 2 F. Supp. 2d 647, 662 (E.D. Pa. 1997). Attorneys are not obliged to call every witness suggested to them. They may choose only witnesses who are likely to assist their theory of the case. See United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990); see also United States v. Griffin, 1993 U.S. Dist. LEXIS 1231, 1993 WL 34927 (E.D. Pa. 1993), aff'd, 16 F.3d 406 (1993). Mere criticism of a tactic or strategy is not in itself sufficient to support a charge of inadequate representation. United States v. Vincent, 758 F.2d 379, 382 (9th Cir.), cert. denied, 474 U.S. 838, 88 L.Ed. 2d 95, 106 S. Ct. 116 (1985). This is particularly so where defendant, informed of the reasonable options, agrees to the pursuit of a particular strategy at trial.

Commonwealth v. Holloway sets forth a five-prong test to prove that counsel was ineffective for failing to call a witness. Petitioner must show that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the witness was so prejudicial, it denied petitioner a

fair trial. Commonwealth v. Holloway, 559 Pa. 258, 739 A.2d 1039, 1048 (1999).

The Superior Court reviewed the PCRA court's holding, and determined that petitioner did not meet the fourth and fifth requirements of the Holloway test. The Superior Court's holding is neither contrary to nor an unreasonable application of federal law because trial counsel's strategy was based on a deliberate decision to pursue a rational defense strategy ultimately approved by petitioner. Trial counsel testified that the reason he did not interview the three witnesses was that many people resisted cooperation with the defense out of fear of the victim. Even if the witnesses agreed to testify, counsel would not have called them because their testimony would have jeopardized counsel's defense strategy by identifying petitioner in violent situations.

Petitioner does not allege the potential witnesses were willing to testify for the defense; petitioner fails to meet the fourth requirement of the Holloway test. Petitioner also fails to demonstrate the absence of the witnesses prejudiced his defense: (1) the testimony of these witnesses may have compromised his defense strategy; and (2) petitioner failed to show the absence of these witnesses denied a fair trial. The court finds no basis for habeas relief on this claim and petitioner's objection regarding ineffective assistance of counsel will be overruled.

2. Ineffective Assistance of Trial Counsel for Failing to Cross-Examine the Victim at Trial Properly

Fithian also claims that trial counsel was ineffective in failing to cross-examine the victim properly. He argues that: (1) had counsel's cross-examination been proper, the jury would

have found the victim was lying, and resulted in a different trial outcome; and (2) the Superior's Court disposition of this claim, based on incomplete evidence, was an "unreasonable application" of the governing legal principles of Strickland.

The Superior Court found trial counsel examined the victim in a satisfactory manner. Witness examination methods fall within the realm of trial strategy, and necessitate a strong level of deference to the attorney's decisions. Diggs v. Owens, 833 F.2d 439, 444-45 (3d Cir. 1987), cert. denied, 485 U.S. 979, 99 L.Ed.2d 488, 108 S. Ct. 1277 (1988) ("An attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial. Consequently, judicial scrutiny of an attorney's competence is highly deferential.") The mere fact that a tactic has been unsuccessful does not necessarily establish that it was unreasonable. Strickland, 466 U.S. at 689.

Trial counsel's cross-examination strategy was not unsound. He presented the victim with a copy of his statement to the police, proceeded to ask questions about it, and inquired about inconsistencies between the statement and trial testimony. In light of the evidence, the court cannot find the cross-examination improper or the trial counsel ineffective. The Superior Court's disposition of the claim was not an "unreasonable application" of the governing legal principles of Strickland. Habeas relief on this ground will be denied.

4. Conclusion

Petitioner's Gagliotti claim was procedurally defaulted. The other two remaining claims were exhausted, but the state court's decisions that the absence of certain witnesses did not cause an unfair trial and that trial counsel adequately cross-examined the victim, were neither contrary to Supreme Court

precedent nor an unreasonable application of it. Petitioner's objections will be overruled; his petition for habeas corpus will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAYMOND FITHIAN, JR.,	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT D. SHANNON,	:	
Superintendent,	:	
AND	:	
THE DISTRICT ATTORNEY OF	:	
THE COUNTY OF DELAWARE,	:	
AND	:	
THE ATTORNEY GENERAL OF	:	
THE STATE OF PENNSYLVANIA	:	NO. 02-1861
Respondents		

ORDER

AND NOW, this _____ day of July, 2002, after careful and independent consideration of the petition for a writ of habeas corpus filed under 28 U.S.C. **§** 2254, review of the Report and Recommendation of Magistrate Judge Charles B. Smith and petitioner's objections thereto, in accordance with the attached memorandum,

It is **ORDERED** that:

i. Petitioner's Objections to the Report and Recommendation of Magistrate Judge Charles B. Smith (#6) are **OVERRULED**.

ii. The Report and Recommendation of Magistrate Charles B. Smith (#7) is **APPROVED** and **ADOPTED**.

iii. The petition filed pursuant to 28 U.S.C. § 2254 is **DISMISSED and DENIED without an evidentiary hearing.**

iv. There is no basis for issuing a certificate of appealability.

_____
Norma L. Shapiro, S.J.